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No. 88-191

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

UNITED GAS PIPE LINE COMPANY,
Petitioner,
v.

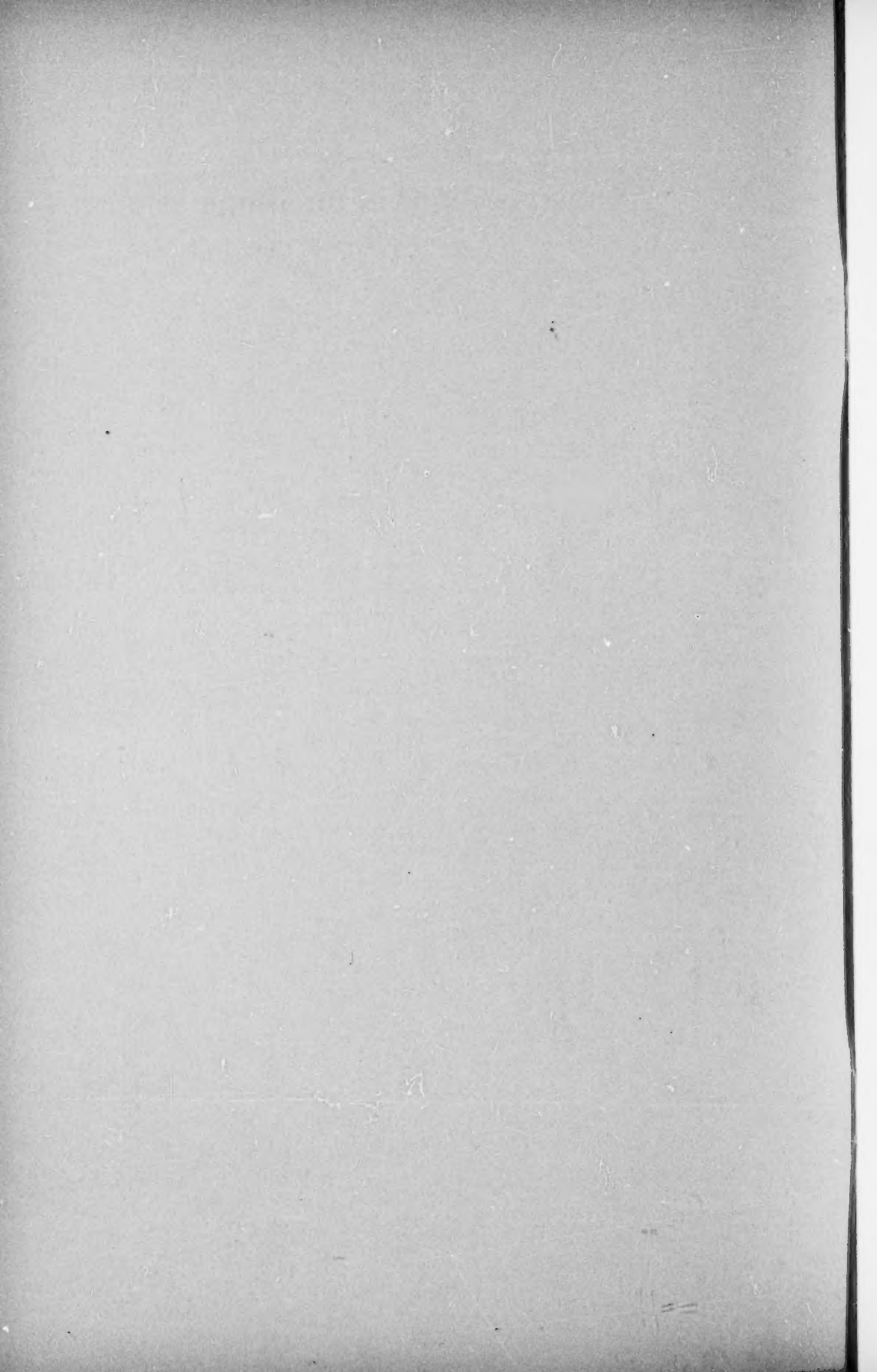
LOUISIANA POWER & LIGHT COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the
Louisiana Court of Appeal, Fourth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE
AND BRIEF OF INTERSTATE NATURAL
GAS ASSOCIATION OF AMERICA AS AMICUS CURIAE
IN SUPPORT OF PETITION FOR CERTIORARI

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September 27, 1988



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**MOTION OF INTERSTATE NATURAL
GAS ASSOCIATION OF AMERICA
FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE
IN SUPPORT OF PETITION FOR CERTIORARI**

The Interstate Natural Gas Association of America ("INGAA") hereby moves for leave to file the accompanying brief amicus curiae in the captioned matter. This motion is being filed in compliance with the Court's Rule 36. INGAA sought the consent of the parties to file a brief amicus curiae in support of the petition for a writ of certiorari filed by United Gas Pipe Line Company ("United"). United has provided its consent and a copy of that consent has been filed with the Clerk. Despite the industrywide importance of this case the Respondents Louisiana Power & Light Company, the City of New Orleans, and the Louisiana Public Service Commission, declined to give their consent.

INTEREST OF THE AMICUS CURIAE

INGAA is a nonprofit national association representing virtually all of the major interstate natural gas transmission companies operating in the United States.* INGAA's members account for over 90 percent of all natural gas transported and sold for resale in interstate commerce, and they are subject to the jurisdiction of the Federal Energy Regulatory Commission under various provisions of the Natural Gas Act, 15 U.S.C. §§ 717-717z (1982 & Supp. IV 1986) ("NGA"); the Department of Energy Organization Act, 42 U.S.C. §§ 7101-7375 (1982 & Supp. IV 1986); and the Natural Gas Policy Act of 1978, 15 U.S.C. §§ 3301-3432 (1982 & Supp. IV 1986). INGAA's membership also includes three Canadian interprovincial pipelines categorized as Group I pipelines by the National Energy Board of Canada.

This case arose out of the severe natural gas shortfall that confronted the entire country in the 1970's. Demand outpaced supply and necessitated action by the Federal Power Commission and its successor agency, the Federal Energy Regulatory Commission (both hereinafter "Commission"). The Commission, acting under its plenary authority to regulate curtailments, *see Federal Power Comm'n v. Louisiana Power & Light Co.*, 406 U.S. 621 (1972), responded to the severe shortfall with numerous industrywide orders, including orders directing natural gas pipelines to curtail deliveries in accordance with a set of curtailment priorities based on gas usage, *i.e.*, "end-use" curtailment priorities. *See* Order No. 431, 45 F.P.C. 570 (1971); Order Nos. 467, 49 F.P.C. 85 (1973) and 467-B, 49 F.P.C. 583 (1973). Petitioner and virtually all other pipelines were required to file tariffs with the Commission reflecting these curtailment priorities, which were to be implemented irrespective of conflicting contractual provisions.

* See Appendix, *infra*, for a list of INGAA members.

In carrying out curtailments under these filed tariffs, interstate pipelines believed that such compliance would provide reasonable protection for them against claims for contractual damages arising out of curtailments. In a proceeding involving United, the Commission confirmed this expectation by holding that United's compliance with its curtailment tariffs exonerated it from liability unless the curtailments had been caused by its own "negligence or willful misconduct." *United Gas Pipe Line Co.*, 35 F.E.R.C. ¶ 61,344, at 61,786 (1986). On review under the NGA, the United States Court of Appeals for the Fifth Circuit affirmed this standard of liability, emphasizing that the negligence requirement was a federal standard incorporating specific (albeit commonly understood) elements. *United Gas Pipe Line Co. v. Federal Energy Regulatory Comm'n*, 824 F.2d 417 (5th Cir. 1987). Upon the Fifth Circuit's affirmation, the Commission's decision became final.

In the meantime, the Louisiana Court of Appeal, in a breach of contract case arising from United's curtailments, had imposed upon United a \$180 million judgment without regard to the federal negligence standard. After the Commission's order became final, the Louisiana Court of Appeal and then the Supreme Court of Louisiana were requested to reconsider the imposition of liability in light of the federal negligence standard. On each occasion the Louisiana courts declined to do so without explanation.

The Louisiana Court of Appeal decision is of substantial concern to natural gas transmission companies because it creates uncertainties regarding the efficacy of federal regulatory orders and because it establishes standards for the rendering of natural gas service that conflict with those mandated by the NGA. In short, it creates an egregious conflict between state and federal law.

In this regard, the Commission order holding that United's curtailment liability was limited to curtailments shown to have been caused by its own negligence or will-

ful misconduct became final and non-appealable under the NGA. Yet the Louisiana courts have ignored that order and have held the pipeline liable under a broader standard that falls short of the federal standard.

The uncertainty created over the validity of final agency action is particularly disquieting here because it opens to question whether pipeline curtailment tariffs, which reflect Commission curtailment policies and orders, can be effectively implemented. The Commission has properly held that, to exercise its curtailment authority, pipelines complying with that authority must be exonerated from curtailment liability absent a showing of at least negligence. If state courts can impose liability without regard to this negligence requirement, the Commission's authority to insulate curtailing pipelines from unwarranted liability, and hence its authority to implement curtailments generally, will be undermined.

Moreover, the liability standards applied by the Louisiana Court of Appeal fundamentally conflict with a pipeline's service obligations under the NGA. The Louisiana Court of Appeal held that United's sales contracts in Louisiana obligated it to stockpile gas supplies *at any* cost in order to avoid liability for a subsequent shortfall—no matter how unforeseeable that shortfall might have been. This service obligation established by the Louisiana judiciary is in direct contrast to a pipeline's obligations under the NGA to provide adequate service at the lowest reasonable cost. Pipelines cannot adhere to both standards. The Louisiana decision has placed them in a genuine dilemma, which only this Court can resolve.

The participation of INGAA as *amicus curiae* will provide this Court with the views of the interstate natural gas pipeline industry and will thus broaden the Court's perspective as to the importance of this case to the national interest. No other party to this case is in a position to represent the views of the interstate pipeline industry.

WHEREFORE, for the reasons stated above, INGAA respectfully prays that this motion be granted and that this Court receive the attached brief amicus curiae for filing.

Respectfully submitted,

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September 27, 1988



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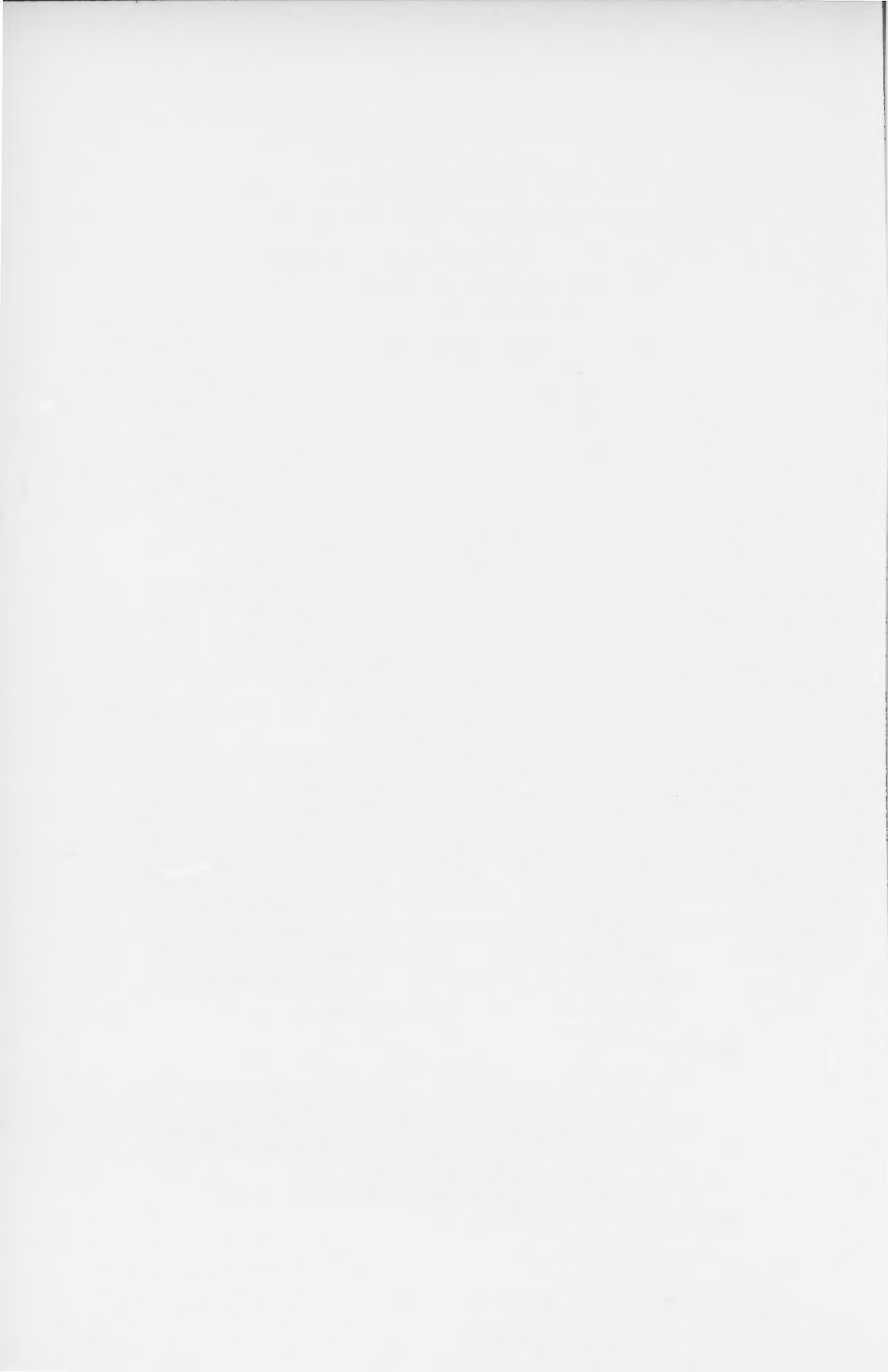
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**BRIEF OF INTERSTATE NATURAL
GAS ASSOCIATION OF AMERICA
AS AMICUS CURIAE IN SUPPORT
OF PETITION FOR CERTIORARI**

The Interstate Natural Gas Association of America ("INGAA") is filing this brief in support of the petition of United Gas Pipe Line Company ("United" or "Petitioner") for a writ of certiorari to review the April 30, 1987 judgment of the Court of Appeal of Louisiana, Fourth Circuit ("Louisiana Court of Appeal") in *City of New Orleans v. United Gas Pipe Line Co.*, 517 So. 2d 145 (La. Ct. App. 1987), reproduced as Pet. App. A.¹

¹ "Pet. App." refers to the Appendix to Petition for Writ of Certiorari filed by Petitioner on August 2, 1988.

INTEREST OF THE AMICUS CURIAE

INGAA is a nonprofit national association representing virtually all of the major interstate natural gas transmission companies operating in the United States and three inter-provincial Canadian pipelines categorized as Group I pipelines by the National Energy Board of Canada. INGAA's U.S. members account for over 90 percent of all natural gas transported and sold for resale in interstate commerce, and they are subject to the jurisdiction of the Federal Energy Regulatory Commission under various provisions of the Natural Gas Act, 15 U.S.C. §§ 717-717z (1982 & Supp. IV 1986) ("NGA"); the Department of Energy Organization Act, 42 U.S.C. §§ 7101-7375 (1982 & Supp. IV 1986); and the Natural Gas Policy Act of 1978, 15 U.S.C. §§ 3301-3432 (1982 & Supp. IV 1986). For the reasons set forth in the accompanying motion, the decision of the Louisiana Court of Appeal results in substantial prejudice to interstate natural gas pipelines.

ARGUMENTS IN SUPPORT OF PETITION

In enacting the NGA, the Congress of the United States declared that "[f]ederal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest." 15 U.S.C. § 717(a). To carry out this "federal regulation," Congress entrusted the Commission with the exclusive authority to regulate the interstate natural gas market. This Court has repeatedly affirmed the pervasiveness of the Commission's exclusive jurisdiction under the NGA and under the companion Federal Power Act, 16 U.S.C. §§ 791a-828c (1982 & Supp. IV 1986), also administered by the Commission.² The Com-

² *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, — U.S. —, 108 S. Ct. 2428 (1988); *Schneidewind v. ANR Pipeline Co.*, — U.S. —, 108 S. Ct. 1145 (1988); *Transcontinental Gas Pipe Line Corp. v. State Oil and Gas Bd.*, 474 U.S. 409 (1986); *Northern Natural Gas Co. v. State Corp. Comm'n*, 372 U.S. 84 (1963).

mission's exclusive authority "binds both state and federal courts and is in the former respect mandated by the Supremacy Clause [U.S. Constitution art. VI, cl. 2]." *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 108 S. Ct. at 2439. Interstate pipeline companies are similarly bound by final rulings of the Commission in conducting their business.

In *Federal Power Commission v. Louisiana Power & Light Co.*, 406 U.S. 621 (1972) ("*FPC v. LP&L*"), this Court held that the Commission had exclusive authority to regulate curtailments instituted by interstate pipelines. Because curtailments by definition represent deliveries of less gas than a pipeline's customers would otherwise have received, curtailments raise questions of potential pipeline liability and, particularly, of the extent to which the Commission regulation precludes such liability. These questions, left open in *FPC v. LP&L*, were finally addressed in connection with Petitioner's curtailment proceedings in Commission Opinion No. 237, *United Gas Pipe Line Co.*, 31 F.E.R.C. ¶ 61,336 (1985), Pet. App. E at 115a, and in Opinion No. 237-A, *United Gas Pipe Line Co.*, 35 F.E.R.C. ¶ 61,344 (1986), Pet. App. F at 141a. The Commission held that Petitioner's compliance with its tariffs and Commission orders would exonerate it "from breach of contract claims, provided that the curtailments were not caused by its negligence or willful misconduct" Pet. App. F at 141a.³ In so holding,

³ Shortly after Opinion Nos. 237 and 237-A were issued, the Commission reached the same conclusion regarding another pipeline's potential liability for curtailments. *Transcontinental Gas Pipe Line Corp.*, Opinion No. 248, 35 F.E.R.C. ¶ 61,043, at 61,080 (1986) (claims that "arise because of curtailments initiated and conducted in accordance with effective curtailment tariffs are preempted by Federal law, which nullifies them. But claims that require a finding of 'negligence' to permit recovery remain unaffected.") On appeal, the United States Court of Appeals for the District of Columbia Circuit affirmed the Commission's limitation on liability, adopting "as our own the well-reasoned position set forth in *United Gas Pipe Line Co. v. FERC*, 824 F.2d 417, 425-30

the Commission concluded that permitting curtailment liability to be imposed upon Petitioner absent a showing of negligence would interfere with the Commission's curtailment jurisdiction by granting undue preferences to the litigants and by subjecting other curtailed customers to an undue prejudice. Pet. App. E at 131a-132a.

On appeal, the United States Court of Appeals for Fifth Circuit affirmed the Commission's adoption of a negligence standard for pipeline curtailment liability. *United Gas Pipe Line Co. v. Federal Energy Regulatory Comm'n*, 824 F.2d 417 (5th Cir. 1987) ("*United v. FERC*") ; Pet. App. G at 161a. Moreover, the Fifth Circuit emphasized that the negligence standard not only preempted state laws imposing liability without culpability, but also preempted state laws imposing liability under "a standard of culpability less than negligence."

Were a state to apply a standard of culpability less than negligence, that standard would directly conflict with the Commission's jurisdictional determination of the public interest and would be void under the supremacy clause, U.S. Const. art. VI, cl. 2.

Pet. App. G at 181a.

Prior to the Fifth Circuit's decision, the Louisiana Court of Appeal had held Petitioner liable for \$180 million in damages for curtailments to a customer. *City of New Orleans v. United Gas Pipe Line Co.*, Pet. App. A. In rendering this judgment, the Louisiana court made no true finding of negligence. Rather, it found that Petitioner's pre-curtailment actions, "however reasonable in other contexts," nonetheless "did not constitute a reasonable effort to perform those contracts [with the plaintiff], especially in their implied obligations to have and maintain, or to acquire, at whatever cost, the gas necessary to fulfill the explicit delivery obligations." Pet. App. A

(5th Cir. 1987)." *Transcontinental Gas Pipe Line Corp. v. Federal Energy Regulatory Comm'n*, No. 86-1358 (D.C. Cir. Feb. 16, 1988), *reh'g denied in pertinent part* (Apr. 22, 1988).

at 9a. Even assuming *arguendo* that the Louisiana court applied some *state* standard of culpability in holding Petitioner liable, it clearly utilized a "standard of culpability less than negligence" and hence conflicts with the Commission's determination.

I. THE LOUISIANA COURTS' FAILURE TO APPLY THE FEDERAL STANDARD OF LIABILITY CREATES SUBSTANTIAL UNCERTAINTIES OVER THE VALIDITY OF FINAL COMMISSION ACTION AND THE EXCLUSIVENESS OF COMMISSION JURISDICTION.

The Louisiana courts' failure to adhere to the negligence standard adopted by the Commission creates troubling uncertainties for pipelines seeking to comply with their federal obligations. Limitations on liability are "an integral part of a proposed curtailment plan." *United v. FERC*, Pet. App. G at 175a, (quoting *Louisiana v. Federal Power Comm'n*, 503 F.2d 844, 867 (5th Cir. 1974)). In carrying out curtailments under the Commission's direction pursuant to filed tariffs, pipelines reasonably expected that their adherence to curtailment tariffs would not subject them to contract liability for curtailments. See *FPC v. LP&L*, 406 U.S. at 621; *International Paper Co. v. Federal Power Comm'n*, 476 F.2d 121 (5th Cir. 1973). They also expected that, to the extent such liability might be imposed, it would only be imposed under a uniform federal standard that was fair and consistent with the comprehensive scheme of federal regulation.

In Petitioner's curtailment proceedings the Commission, after long deliberation, confirmed that pipelines cannot be subjected to curtailment liability solely for adhering to filed tariffs. Rather, the Commission held, there must be a showing of negligence or willful misconduct. The Fifth Circuit affirmed, and made clear that the Commission's standard was a substantive one from which states cannot deviate. The Fifth Circuit also ob-

served that the standard applied by the Louisiana Court of Appeal in holding Petitioner liable for \$180 million in curtailment damages fell short of the federal standard, but it assumed that the state courts would rectify the situation by "enforc[ing] the federal standard" Pet. App. G at 181a-182a, n.15. In fact, the Louisiana courts twice, *without comment*, refused requests that the judgment be reconsidered in light of the federal negligence standard. Pet. App. B and D.

Natural gas pipelines are bound by final rulings of the Commission, and rely upon the finality of such rulings. As part of the federal regulatory scheme, it is expected that, once established, Commission policies will be applied consistently to all regulated entities. 15 U.S.C. § 717c; *Northern Natural Gas Co. v. State Corp. Comm'n*, 372 U.S. at 91-92. Therefore, it is critical from the standpoint of the interstate pipeline industry that final Commission action, particularly action limiting the scope of state law with regard to liability for federal regulated activities, be honored, and that the paramount power of properly exercised federal authority over state law be preserved.

The Louisiana Court of Appeal decision stands in conflict with these principles and casts a cloud over the validity of final agency action. If the decision is allowed to stand, pipelines will be confronted with great uncertainty as to which final Commission actions can be relied upon as valid.

Such uncertainty undermines both the authority of the Commission to assure that its orders are made effective, and the legitimate reliance of regulated pipelines that they will not be penalized for following Commission orders. When the Commission explicitly defines a standard for liability, preempting inconsistent state standards, pipelines subject to Commission authority must have the assurance that such a declaration is effective. Absent such assurance, regulated pipelines could not know what

legal standard would govern their conduct and would not be able to conform their conduct to the applicable standard. Thus, the difficulties created by the Louisiana Court action have a compelling practical effect on companies subject to federal regulation.

In short, the Louisiana Court of Appeal decision effectively negates the express ruling of the Commission made in the exercise of its exclusive jurisdiction: that a pipeline will not be subjected to liability for curtailments carried out under filed tariffs unless shown to have been negligent or worse in bringing about those curtailments. There is no basis for the Louisiana courts' failure to adhere to this standard. Such failure impairs the confidence of pipelines in the Commission's ability to afford them protection from unwarranted liability and thwarts the Commission's achievement of its regulatory objectives.

II. THE LIABILITY STANDARDS APPLIED BY THE LOUISIANA COURT OF APPEAL ARE IN CONFLICT WITH THE NORMS OF CONDUCT UNDER THE NGA.

In adopting its negligence standard, the Commission made another fundamental determination: the finding of negligence was to be made exclusively by the courts. Pet. App. E at 139a. However, this Court on other occasions has cautioned against permitting states to impose on regulated entities their "own version of reasonable service requirements" ⁴

Thus, while state courts may evaluate the reasonableness of pipeline's actions in determining whether it improperly caused its curtailments, they may not make such an evaluation based upon the state's "own version of reasonable service requirements." Indeed, this is the reason the Commission and the Fifth Circuit have expressly held

⁴ *Chicago and North Western Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 326 (1981); accord *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 580 (1981).

that pipeline liability for curtailments must be determined under a negligence standard, the elements of which were articulated by the Fifth Circuit. The Fifth Circuit stated that the standard was one of “objective reasonableness.” Pet. App. G at 183a. In essence, “proof of foreseeability is a necessary element of the Commission’s standard” because “[i]f the need for curtailment was not reasonably foreseeable, imposition of liability for curtailments does little to encourage prudent management.” *Id.*

The standard under which the Louisiana Court of Appeal held Petitioner liable is not one of “objective reasonableness.” Rather, the court applied Louisiana’s own version of what constitutes reasonable service requirements for a pipeline doing business in the state. In the eyes of the Louisiana court, Petitioner’s fault was in making management decisions aimed either at avoiding “increased costs to perform . . .” or at “saving costs.”⁵ Indeed, the core of the Louisiana court’s critique of Petitioner’s conduct was that Petitioner had neglected its “implied [contractual] obligations to have and maintain, or to acquire, *at whatever cost*, the gas necessary to fulfill the explicit delivery obligations.” Pet. App. A at 9a (emphasis added).

By defining a pipeline’s fault as failing to acquire gas “at whatever cost,” the Louisiana court imposed a standard that is fundamentally at odds with a pipeline’s service obligations under the NGA and with industry norms. A central principle of federal regulation is that pipelines are charged with rendering adequate service at the lowest

⁵ Pet. App. A at 11a, 15a. Specifically, the Louisiana Court of Appeal found that, with respect to Petitioner’s release of reserves in the early 1960’s to reduce take-or-pay costs, while Petitioner “does show that take-or-pay costs and other considerations prompted its business decisions, . . . increased costs to perform do not excuse nonperformance of contracts.” *Id.* at 11a. The court also criticized Petitioner for taking actions for “business reasons aimed not at performance of its contracts but at saving costs” *Id.* at 15a.

reasonable cost.⁶ This means that, under appropriate circumstances, a pipeline's decision to reduce inventory either by reducing or eliminating the purchase of costly gas supplies or releasing high-priced reserves may be perfectly reasonable—even required—under the NGA.⁷

These considerations are of paramount practical significance to pipelines today and in the future. The unforeseen oversupply of gas that has prevailed nationally in the mid- and late 1980's has led to a sharp decline in gas prices, and nearly all interstate pipelines have released substantial reserves originally contracted for at higher prices in order to meet price competition.⁸ In order to facilitate economic efficiency, it has been the policy of the Commission to encourage such releases, even though they reduce a pipeline's reserve inventory.⁹ If a

⁶ *Atlantic Ref. Co. v. Public Serv. Comm'n*, 360 U.S. 378, 380 (1959); *Federal Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591, 611 (1944); *Midwestern Gas Transmission Co.*, 36 F.P.C. 61, 70 (1966), *aff'd*, *Midwestern Gas Transmission Co. v. Federal Power Comm'n*, 388 F.2d 444 (7th Cir.) *cert. denied*, 392 U.S. 928 (1968).

⁷ *Permian Basin Area Rate Cases*, 390 U.S. 747 (1968). In this regard, the Commission's recent order promulgating a new abandonment policy to facilitate, *inter alia*, abandonment of gas purchases under expired, terminated or modified gas purchase contracts suggests as one rationale for such policy that such abandonment will encourage economic efficiency. *Abandonment of Sales and Purchases of Natural Gas Under Expired, Terminated, or Modified Contracts*, Order No. 490, 53 Fed. Reg. 4,121, 4,124 (Feb. 12, 1988), F.E.R.C. Statutes and Regulations ¶ 30,797, at 31,026, *appeal docketed sub nom. Marathon Oil Co. v. Federal Energy Regulatory Comm'n*, No. 88-3666 (6th Cir. July 26, 1988).

⁸ See, e.g., *Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol*, Order No. 500, 52 Fed. Reg. 30,334, (Aug. 14, 1987), F.E.R.C. Statutes and Regulations ¶ 30,761, *appeal docketed sub nom. American Gas Ass'n v. Federal Energy Regulatory Comm'n*, No. 87-1588, *et al.* (D.C. Cir. Oct. 19, 1987).

⁹ See *Abandonment of Sales and Purchases of Natural Gas Under Expired, Terminated, or Modified Contracts*, Order No. 490, 53

future shortage necessitating curtailments should occur, application of the Louisiana standard rather than the Commission standard in evaluating a pipeline's conduct could result in widespread imposition of liability for actions taken in conformity with the Commission's policies. It is critical that actions be judged on the basis of Commission policies in effect at the time the actions were taken and not on the basis of factual circumstances that evolved afterward. Thus, the interest of the interstate pipeline industry in the issue before this Court is very practical and by no means abstract.

In holding Petitioner liable for curtailments based on its failure to maintain or acquire gas "whatever the cost," the Louisiana Court of Appeal has mandated that interstate pipelines operating in Louisiana abide by a standard that conflicts directly with the norms under which pipelines perform their service obligations under the NGA. The Louisiana court's action exemplifies why the federal negligence standard is the correct standard and why it must be adhered to by state courts.

CONCLUSION

The issues of law and public policy raised by this case are of deep and immediate concern to the interstate natural gas pipeline industry. The conflict between the Louisiana Court of Appeal decision and the Commission's order as affirmed by the Fifth Circuit must be resolved by this Court to preserve the integrity and preemptive effect of Commission jurisdiction, to permit achievement of Commission's regulatory objectives, and to restore confidence in the federal regulatory scheme. Accordingly, INGAA urges this court to issue a writ of certiorari in this proceeding.

Respectfully submitted,

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September 27, 1988



APPENDIX

INTERSTATE NATURAL GAS ASSOCIATION
OF AMERICA*1988 ACTIVE MEMBERSHIP*

AlaTenn Resources, Inc.
Arkla, Inc.
The Coastal Corporation
Columbia Gas Transmission Corp.
Consolidated Natural Gas Company
El Paso Natural Gas Company
Enron Corp.
Foothills Pipe Lines (Yukon) Ltd.
Granite State Gas Transmission, Inc.
Great Lakes Gas Transmission Company
Kentucky West Virginia Gas Company
KN Energy, Inc.
Lone Star Gas Company
Michigan Gas Storage Company
MidCon Corp.
Pacific Gas Transmission Company
Pacific Interstate Company
Panhandle Eastern Corporation
Polc Energy Corporation
Questar Pipeline Company
SONAT, Inc.
Tenneco Gas Pipeline Group
Texas Eastern Gas Pipeline Company
Texas Gas Transmission Corporation
Texas Oil & Gas Corporation
TransCanada Pipe Lines
Transcontinental Gas Pipe Line Corporation
United Gas Pipe Line Company
Valero Interstate Transmission Company
Valley Gas Transmission, Inc.
Westcoast Energy Inc.